

April 26, 2002

Mr. Bruce Ellis, Chief  
Environmental Resources Management Division  
Bureau of Reclamation  
Phoenix Area Office  
P.O. Box 81169  
Phoenix, AZ 85069-1169

*Via Fax (602-216-4006) and Mail*

Dear Mr. Ellis:

Defenders of Wildlife (Defenders) submits the following comments on the proposed Imperial Irrigation District Water Conservation and Transfer Project and Draft Habitat Conservation Plan, Draft Environmental Impact Report/Environmental Impact Statement (Transfer DEIS) on behalf of its approximately 470,000 members and supporters. This letter supplements another letter submitted by Defenders and other organizations on the Transfer DEIS. Defenders has also submitted comprehensive comments on the Implementation Agreement and Inadvertent Overrun Payback Policy DEIS, and Quantification Settlement Agreement (QSA) DEIR, and submits these comments as applicable to the environmental review in each of these documents.

First, we want to reiterate the Defenders supports all efforts aimed at reducing California's reliance on Colorado River water. We agree that the benefits of reductions in California's consumption of river waters will accrue to the entire basin. However, as currently constructed, each of the elements of the QSA will result in immediate, adverse impacts to much of the basin, extending into the delta. Reallocation or surplus or conserved water and reoperation of Bureau of Reclamation (BOR) facilities must not result in significant environmental and socioeconomic impacts. Individual letters on these projects illustrate the failure to adequately assess environmental impacts and identify mitigation measures. One of the primary causes of the inability to give a hard look at the impacts of these actions is the unacceptable practice of segmenting these environmental analyses, thereby deferring and/or isolating the impacts that are individually and cumulative significant.

By contracting the scope of the NEPA review for this, and for related, projects, BOR has failed to afford the public a meaningful analysis of the cumulative and synergistic effects of the proposed project, and those related to it.

As it issues separate EISs for the All-American Canal lining, the Coachella Canal lining, the Interim Surplus Guidelines, the Implementation Agreement and Inadvertent Overrun and Payback Policy, and the Imperial

Irrigation District Water Conservation and Transfer Project / Draft Habitat Conservation Plan, the Bureau decides that each “linchpin” of the Quantification Settlement Agreement (QSA) is a separate ‘major federal action.’ This is in violation of NEPA. “Agencies shall use the criteria for scope (Sec. 1508.25) to determine which proposal(s) shall be the subject of a particular statement. Proposals or parts of proposals which are related to each other closely enough to be, in effect, a single course of action shall be evaluated in a single impact statement.” 40 C.F.R. § 1502.4(a) (emphasis added). All of these actions are connected and must be analyzed in one EIS.

“To determine the scope of environmental impact statements, agencies shall consider 3 types of actions . . . They include: (a) Actions (other than unconnected single actions) which may be: (1) Connected actions, which means that they are closely related and therefore should be discussed in the same impact statement. Actions are connected if they: (i) Automatically trigger other actions which may require environmental impact statements. (ii) Cannot or will not proceed unless other actions are taken previously or simultaneously. (iii) Are interdependent parts of a larger action and depend on the larger action for their justification.” 40 C.F.R. § 1508.25(a) (emphasis added). The IA DEIS, Transfer DEIS, and related documents are replete with statements demonstrating that the actions are connected because each triggers others and because one cannot proceed without the others.

First, the QSA and the actions in it are interdependent; each one triggers one or more actions that have required EISs. *See* 40 C.F.R. § 1508.25(a)(1)(i). In *Kleppe v. Sierra Club*, petitioners sought NEPA review for coal-related activities in the North Great Plains region. Unlike the situation in *Kleppe* where “[i]n the absence of a proposal for a regional plan of development, there is nothing that could be the subject of the analysis envisioned by” NEPA, *Kleppe v. Sierra Club*, 427 U.S. 390, 401 (1976), the QSA is “an agreement . . . [that] establishes a framework of conservation measures and water transfers within southern California.” 67 Fed. Reg. 1988 (Jan. 15, 2002). The parties’ obligations are subject to: promulgation of the Interim Surplus Guidelines (ISG), Inadvertent Overrun and Payback Policy (IOP), and Implementation Agreement (IA); satisfaction of NEPA and CEQA review of the ISG, IOP, the Imperial Irrigation District Water Conservation and Transfer Project (IID Transfer), the All American Canal lining (AAC lining), the Coachella Canal lining, and the CVWD Groundwater Recharge project; and ESA approvals for the each of these actions (collectively “QSA Actions”). *QSA Article 6.2.*

The QSA is exactly the hypothetical regional plan that the court in *Kleppe* sought; “[a] regional plan [that] would define fairly precisely the scope and limits of the proposed development of the region.” *Kleppe*, 427 U.S. at 402. “[T]he QSA sets forth the approved parameters of various water transfers and exchanges, including the conservation by IID of up to 300 KAFY for transfer to SDCWA, CVWD, and/or MWD. The QSA allocates the water to be conserved by the AAC and Coachella Canal lining projects. The QSA also incorporates a consensual limit by IID on its total Priority 3 diversions of Colorado River water at 3.a MAFY. . . .” Transfer DEIS/DEIR App.C 1-4. Thus, the QSA is a well-defined contract requiring a programmatic EIS on the QSA components in Article 6, each of which have undergone or are

undergoing separate NEPA compliance.<sup>1</sup> In fact, each of the NEPA documents for these actions affirms the “triggering” of one or more of the QSA Actions by the QSA itself or other QSA Actions. “The execution of the IA constitutes the Secretary’s approval of the QSA.” DEIS at 1-15. “[T]he Proposed Project [IID transfer] is a component of the IA.” Transfer DEIS 1-5.

*Kleppe* goes on to say, Section “102(2)(C) may require a comprehensive impact statement in certain situations where several proposed actions are pending at the same time.” *Kleppe*, 427 U.S. at 409. “Thus, when several proposals for coal-related actions that will have cumulative or synergistic environmental impact upon a region are pending concurrently before an agency, their environmental consequences must be considered together.” *Id.* at 410. Because the QSA requires completion of each of these projects, or environmental review of them, before December 31, 2002, BOR was well aware of the purpose, need and time frame for all of the QSA Actions. *See QSA Art. 6.1.*

These actions are closely related, will occur in southern California, and are before BOR at the same time. Each project was pending before the agency during the ISG’s NEPA review, the first in this series of segmented EISs. *See* ISG FEIS Sec. 1.4.1.1 – 1.4.5 (Related and Ongoing Actions).<sup>2</sup> In fact, the biological assessment and biological opinion on the ISG also cover the IA. *See* Biological Opinion for Interim Surplus Criteria, Secretarial Implementation Agreements, and Conservation Measures on the Lower Colorado River, Lake Mead to the Southerly International Boundary Arizona, California, and Nevada (January 12, 2001). Even more revealing, the Secretary will make a final decision on the IA and IOP Proposed Action concurrent with one on the IID transfer. IA DEIS 1-2.

Moreover, “when the projects in a particular geographic region are foreseeable and similar, NEPA calls for an examination of their impact in a single EIS.” *See Churchill County v.*

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<sup>1</sup> Indeed, the QSA contemplates preparation by BOR of a programmatic EA or EIS on the proposed QSA. *QSA Article 6.2(2)(a)(1).*

<sup>2</sup> While the initial AAC lining FEIS and ROD were issued in 1994, when the Bureau initiated the NEPA process for the ISG in May 1999, 64 Fed. Reg. 27008 (May 18, 1999), the Bureau was simultaneously reexamining the adequacy of the EIS. Memorandum from Gary Bryant, Area Manager to Regional Director re: Reexamination and Analysis of the 1994 Final EIS/EIR and ROD for the AAC Lining Project.

*Norton*, 276 F.3d 1060, 1077 (9<sup>th</sup> Cir. 2001) (citations omitted). As stated above, with issuance of a draft QSA in December 2000, and since representatives of the Secretary of the Interior were involved in the negotiations leading to the QSA (IID Transfer DEIS at 2-36; App. C 1-4), the Department of the Interior and BOR certainly foresaw the review of these projects over the next two years.

The most concise statement of the similarity and the connections between these projects, even though employed incorrectly, is by BOR itself. NEPA review for the IA (which stands to reason should be the most inclusive EIS) includes “implementation of other interrelated Federal actions,” 66 Fed. Reg. 14211 (emphasis added). However, BOR considers only the IOP and implementation of conservation measures to be interrelated; the DEIS isolates the remaining QSA Actions to separate EISs. Other statements of interrelatedness include “the components of the IA and QSA are interdependent,” IA DEIS 2-28, and “with implementation of the IA and QSA, IID would undertake conservation actions . . .” IA DEIS 3.2-19. Clearly, if the IOP is interrelated because it is a condition precedent to execution of the QSA, and the QSA similarly requires implementation of these other actions, all actions are interrelated and must be in one EIS. *See* Transfer DEIS 5-2 (discussing the “integrated nature of the QSA components”).

Secondly, the QSA cannot be implemented unless each QSA Action is also implemented, generating the need for a single EIS. 40 C.F.R. § 1508.25(a)(1)(ii). *See* QSA Art. 6.1, 6.2(2)(a). In some cases, the QSA Action is a condition precedent to the QSA, in others, to a related QSA Action. As the Bureau of Reclamation has acknowledged:<sup>3</sup>

- Without the IA, there will be no QSA. *See* 66 Fed. Reg. 14211 (“The Department of Interior believes the proposed QSA cannot be lawfully carried out absent a fully executed IA.”); Transfer DEIS 2-4 (Execution of the QSA contingent on Secretary’s execution of the IA); and Transfer 5-6 (IA necessary for “implementation of the QSA, including components of the Proposed Project. . . . IA is a condition precedent to implementation of the QSA”) (emphasis added).
- Without the IOP, there is no QSA. *See* IA DEIS 2-22 (“The IOP is a condition precedent to the IA and QSA . . .”); IA DEIS 1-16 (approval of the IOP is “essential” to the willingness of California agencies to enter into the QSA “and related agreements”) (emphasis added); and IA DEIS 1-1 & Transfer DEIS ES-8 (“IOP is a condition precedent to the execution of the IA and QSA and must be in place by the time these agreements go into effect”).
- Without the ISG, there is no QSA. *See* IA DEIS 4-5 (“The ISG is critical to the overall implementation of the IA and QSA . . . Implementation of the IA and QSA are critical,

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<sup>3</sup> Emphasized text highlights the instances where a QSA Action is necessary not only for implementation of the QSA, but for other QSA Actions. *See also* Transfer DEIS 2-4 (IID’s adoption of a cap on diversions is contingent upon adoption of the IOP).

as the ISG will stay effective only if the QSA and associated agreements are executed by December 31, 2002, and/or . . .”); ISG FEIS 1-22 (stating that the Plan is linked to the ISG in two ways: failure to comply threatens the Bureau’s objective of reliable supplies for users (so the Secretary may condition the ISG on Plan progress) and a reliable supply of surplus is an indispensable condition to Plan implementation); Transfer DEIS 1-31 (adoption of the ISG is a condition precedent to the QSA); and Transfer DEIS 5-8 (ISG are critical to overall implementation of the QSA).

· Without multiple QSA Actions, there is no QSA. *See* Transfer DEIS, App. C 1-4 (“As a condition precedent to the QSA, certain other federal actions [in addition to the IA] are required, including the adoption of Interim Surplus Criteria and the adoption of an Inadvertent Overrun Program”) (emphasis added); and Transfer DEIS 2-54 et seq. (describing the No Action alternative, not only is there no water conservation and transfer, but neither the QSA nor QSA Actions occur).

The same holds true in reverse: without the QSA, these projects will be difficult, if not impossible, to implement. *See Water Deal Hits Snag on Effort to Save Salton Sea*, L.A. Times, Aug. 22, 2001; *Quick OK urged for water from Imperial Valley*, San Diego Union-Tribune, Aug. 11, 2001; Coachella DEIS 1-12 (explaining that without quantification of the third priority in the QSA, it would be difficult to implement these water conservation and exchange programs in the Plan); IA DEIS 2-29 & Transfer DEIS 1-30 (Secretary considers development of a strategy to reduce California’s diversions a prerequisite for Secretarial approval of further water transfers among southern California agencies); and Transfer DEIS ES-7, 1-5 (“Proposed Project a component of the IA, assuming full implementation of the QSA”) (emphasis added).

Even if the Bureau decides not to prepare a programmatic EIS, it must still evaluate the synergistic and cumulative effects of the proposed projects, and this has not been accomplished in separate EISs. Given the insufficiencies of the IID Transfer DEIS, IA DEIS, ISG EIS (on which Defenders has already commented via letters dated April 25, 2002; March 26, 2002; Sept. 8, 2000; Nov. 22, 2000; and Jan. 16, 2001; respectively), AAC EIS and Coachella Canal EIS, no EIS has adequately analyzed direct, indirect and cumulative impacts, or examined alternatives and mitigation to the proposed action – the QSA.

By failing to account for, and therefore mitigate, a single action’s impacts, the analysis of the cumulative impacts is exponentially lacking. CEQ regulations define cumulative impact as the “impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.” 40 C.F.R. § 1508.7. *See Defenders of Wildlife v. Norton*, 130 F.Supp.2d 121 (D.D.C. 2001).

BOR must prepare a programmatic EIS on the QSA and QSA Actions, from which the existing EISs, once revised to correct the deficiencies identified in our and others’ comment

letters, may tier. Only a Programmatic EIS can encompass the scope of actions, alternatives and environmental impacts contemplated by NEPA.

Thank you again for this opportunity to comment.

Sincerely,

Kara Gillon  
Wildlife Counsel

cc:  
Elston Grubaugh, IID  
Laura Fujii, EPA  
William Rinne, BOR